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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CLIFTON WHERRY, JR., et al., Defendants and Appellants.	A127405 (Alameda County Super. Ct. No. C159216)

I. INTRODUCTION

Defendants Clifton Wherry, Jr., (Wherry) and Dwight Campbell (Campbell) were both convicted of felony murder, which occurred during the robbery of an armored truck Wherry was driving. Wherry claims the results of his polygraph test, during which he stated police offered him a two-year deal if he confessed, were improperly excluded. Both Wherry and Campbell assert the prosecutor committed prejudicial misconduct during argument to the jury. We conclude neither contention has merit and affirm. In a separate order, we also deny Wherry's petition for a writ of habeas corpus in case No. A131712.

II. PROCEDURAL BACKGROUND

The Alameda County District Attorney charged Wherry and Campbell each with one count of murder (Pen. Code, § 187, subd. (a))[1] with a felony murder special circumstance that it was committed in the course of a robbery. (§ 190.2, subd. (a)(17)(A).) The information also alleged Wherry was armed with a firearm, (§ 12022,

[1] All further statutory references are to the Penal Code unless otherwise indicated.

subd. (a)(1)) and Campbell personally and intentionally discharged a firearm (§§ 12022.7, subd. (a), 12022.53, subd. (d)).

Following a jury trial, the jury found both Wherry and Campbell guilty of felony murder. The jury also found true the allegation Wherry was armed with a firearm. The jury was unable to reach a verdict as to whether Campbell intentionally discharged a firearm, but found he personally used one. The trial court sentenced both Wherry and Campbell to life imprisonment without the possibility of parole. Wherry was sentenced to an additional year for the firearm enhancement, and Campbell was sentenced to an additional 10 years to run consecutively on his firearm enhancement. These timely appeals followed.

III. FACTUAL BACKGROUND

Anthony Quintero was killed on September 29, 2006,[2] during a robbery of the Brinks armored truck in which he was working. He died from a close-range shotgun wound to his head. Quintero was a "messenger," the employee responsible for picking up and delivering money from businesses, securing it in the back of the armored truck and riding in the back. Quintero had been partnered with Wherry, the truck's driver, for about six or seven months.

After initially denying any involvement, Wherry confessed to participating in the robbery. A few weeks before the incident, Wherry and Will Stallings, an acquaintance from high school, began talking about how it would "be cool just to have a couple . . . G's, you know?" Wherry provided information about "the procedure for gettin[g] in and out [of] the truck." He also told Stallings the Brinks truck would be carrying the most money on a Friday, "[m]aybe 1 or 2 million" dollars. Stallings told Wherry "he'd have a car." They did not plan to kill Quintero. "It was basically [supposed] to be snatch and grab." They "really didn't talk about shootin' him." The robbery would take place after Wherry stopped the truck at a donut shop he frequented.

[2] All further dates referenced are in 2006, unless otherwise noted.

The morning of September 29, Wherry and Quintero were assigned a route and a Brinks truck. The first stop on their route was in San Francisco. At about 7:00 a.m., Wherry drove the armored truck to a donut shop at East 9th and Fruitvale Center in Oakland, an "unauthorized" stop under Brinks' policy. Wherry knew Brinks' policy also required Quintero to get out of the rear of the truck and move to the driver's area when Wherry left the truck. Wherry exited the cab of the truck, and Quintero got in the cab while Wherry purchased donuts. Quintero exited the cab of the truck when Wherry returned and "went to the back of the truck." In order to open the back of the truck, both the driver and messenger must unlock the door in unison; the driver with an electronic switch and the messenger with a key.

Wherry testified that as Quintero was getting in the back of the truck, Wherry saw "a man standing there with a mask on in the stairwell with a gun on [Quintero]." The man got in the truck and told Quintero to be quiet and "get down." Wherry testified he tried to grab the shotgun but the man told him "don't do that or I'm going to shoot him, so [Wherry] put the shotgun down." The man ordered Wherry to drive to the nearest freeway, which he did. The man then told Wherry to get off the freeway and drive for a "couple of blocks," then stop and back up the truck. As he hit the brake, Wherry heard a shot. He looked back and saw the man "grabbing stuff and open the door." Another man was standing outside the door. Both men, who Wherry testified were "Black or Hispanic," wore beanies with a mask and dark clothing. Wherry saw one man hand a bag of money to the other, and the pair ran down East 10th Street.

Wherry called his Brinks dispatcher, "trying to tell them where I'm at so I can get help." The evidence was conflicting regarding what Wherry told the dispatcher about the truck's location and the race of the robbers. The dispatcher testified Wherry told him the robbers were "two Latinos," not African-Americans. Wherry testified he said they were Latino or African-American, but did not think the dispatcher "heard the part about the black." He told the dispatcher he was on "23rd," because he "couldn't see the other sign." The dispatcher assumed Wherry was in San Francisco, because the first delivery on his route was in San Francisco. The dispatcher testified "we kept trying to find the

location where they were at and it kind of spiraled off to 23rd and Fruitvale, Fruitvale and different . . . areas. We couldn't pinpoint where they were at." The police could not find Wherry at the addresses he gave, and they were "getting frustrated." Wherry then said he was on East 10th and 23rd. Police and dispatch spent 15 to 20 minutes trying to locate Wherry after he first called dispatch.

Police questioned Wherry at the scene and at the police station. Initially, he was questioned as a percipient witness to the crime, but police began to suspect him after learning Wherry had not followed Brinks' required procedures for responding to a robbery. The armored truck was equipped with a working siren. There was a shotgun in the driver's compartment, and gun portholes between the driver's compartment and the back of the truck and on each side of the truck "for firing at suspects or robbers." Wherry did not turn on his siren, use the shotgun in the driver's compartment of the truck, or drive away, all of which he had been trained to do.

Police found a ski mask in Wherry's car that Wherry agreed was "dead on in terms of the description of the ski mask . . . the robber was wearing," but stated it belonged to Stallings. Wherry testified he had not seen Stallings for awhile, but "ran into" Stallings in Vallejo in early September. Stallings sat in Wherry's car to talk and left his mask there.

Wherry testified at trial his confession to police was false. He stated Sergeant Tony Jones, had, in an unrecorded conversation, told him "things that I was saying he felt like weren't adding up and he said that you could get the death penalty or if you come clean you get this two-year deal." Wherry also indicated Jones "told me that I would never be able to see my daughter again." He claimed the only reason he confessed was because he was "trying to convince [Jones he was guilty] . . . to get the two-year deal." Wherry explained "nobody in their right mind would rather have a death penalty [than] get a two-year deal. . . . [Y]ou weigh your options on that. You take the two-year deal." Wherry never said anything about the two-year deal when the interviews were being recorded "because it was a deal that I feel me and Tony Jones had made together . . . me and him privately, so I assumed that."

Sergeant Jones testified he did not offer Wherry a two-year deal or tell him he would never see his child again. At trial, Wherry conceded on September 30, Deputy District Attorney Butch Ford interviewed him and asked whether any threats or promises had been made, and he "did say no." Wherry explained he answered "no" because the question was "did we offer threats and promises? And the 'we' would have been referring to the two that were inside the room. So I took it as I answered the question correctly. . . . But I was still hoping to get the two-year deal with Jones."

Wherry told Sergeant Jones he communicated with the other robbers with a pre-paid cellular phone. He told Jones the phone was hidden in the bushes near the Brinks facility, and that Stallings' telephone number was programmed in that phone as number 25. Officers found the cell phone in the bushes with a number programmed as number 25. At trial, Wherry testified he did not tell Jones there was a cell phone in the bushes of the Brinks parking lot, did not know Stallings' number, and the phone recovered from the bushes was not his.

Campbell testified he met William Stallings in the Marines, where Stallings was his commanding officer. In mid-September, 2006, Campbell was having serious financial problems. Stallings called and offered him a driving job. Campbell took a Greyhound bus from his home in southern California to Vallejo in mid-September, where he and Stallings briefly discussed the job. During their conversations, the amount of money Stallings offered him "moved up from like couple hundred, a thousand, went up to $50,000." Campbell returned to southern California because Stallings "didn't have everything ready." On September 28, Campbell again took a Greyhound bus to Vallejo and spent the night in Stallings' truck. The next morning, Stallings told Campbell the job "was going to involve an armored car robbery."

Stallings and Campbell "pick[ed] up" a car to use in the robbery. Stallings then told Campbell he had to rob the truck rather than drive. Campbell refused, but Stallings "pulled out his gun on me and said that I am going to do it." Stallings also showed him a photograph of Campbell's mother's home, which made Campbell think, "If I wasn't going to do it, he was going to hurt my mother, period."

Stallings directed Campbell to drive them to the donut shop. Campbell "noticed there was no way out and [he] had to do what [Stallings] said to do." Stallings told Campbell "some guy was going to go in the back, when the door is open, that would be the time. So. Pretty much, . . . go into the truck, stop the door from closing, talk to the guy in the back and pretty much tell him to . . . go inside and get to the back of the truck." Campbell was wearing a "face mask, beanie" that Stallings gave him.

After Quintero exited the driver's compartment of the truck, Campbell "sternly" told him to get in the back of the truck, which he did. Campbell then put the barrel of his gun to the back of Quintero's neck. He explained this was a technique he learned in the military, so that Quintero would "actually feel it so he know[s] to stop moving." Campbell put his finger on the trigger to get a better grip on the gun. Quintero had his hands raised and begged Campbell not to kill him. Campbell testified the armored truck ride was shaky, and when Wherry hit the brakes, the gun fired accidentally and he shot Quintero on "the side of the back of his head."

Campbell put the gun in a bag and moved the bag to the truck door so he could get the money out of the truck. When he opened the door, Stallings was there with the car. Campbell gave him "the first bag of money." Stallings gave him directions to a meeting spot, and Campbell put a second bag in the car trunk and drove there. At the meeting place, Stallings told him to drive to another spot, where Campbell "gave him pretty much all the money" and the gun. Stallings gave him some money from one of the bags and told him to go to Sacramento for two days, then "go back to [his] regular life" in southern California.

Campbell was apprehended by the FBI about eight days later, and confessed. He did not tell police anything about Stallings pulling a gun on him because he was still afraid Stallings might hurt his mother, even though police told him Stallings had been arrested.

Campbell initially testified he had never met Wherry before the morning of the robbery, when he saw him in the armored truck. When questioned by police, Campbell had identified a photograph of Wherry police showed him. On direct examination, he

testified he had never seen or identified the picture of Wherry. On cross-examination, Campbell admitted he had identified a photo of Wherry during the interrogation. Campbell's cell phone records indicated there was a call from his phone to Wherry on September 16, when he was in northern California meeting Stallings. Campbell explained he let Stallings use his cell phone. Later in Campbell's testimony, on re-cross examination by the prosecutor, he conceded he met Wherry before the robbery. During Campbell's first trip to visit Stallings, he, Wherry and Stallings met and "drove around" together.

There was $2,862,749 in the armored truck when it left the Brinks facility on September 29. Brinks determined $1,243,800 was taken from the truck. All but $13,453 of that was recovered by Brinks. Stallings facilitated the return of the money. He was arrested, but then released, and did not testify at trial.

DISCUSSION

A. Wherry's Polygraph Test

Wherry moved to suppress his confession to police, claiming it was involuntary because Sergeant Jones threatened him with the death penalty and promised him a two-year prison deal if he confessed. In support of his motion to suppress, Wherry sought to introduce the results of a polygraph test he took, which he maintained supported his claim Jones offered him a two-year deal. The court denied his motion, which Wherry asserts was error. Wherry acknowledges the California Supreme Court has upheld the constitutionality of Evidence Code section 351.1, which generally bars introduction of polygraph test results in a criminal proceeding, but asserts he raises the issue "to preserve his right to federal review."

Evidence Code section 351.1 provides in part "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding . . . unless all parties stipulate to the admission of such results." (Evid. Code, § 351.1, subd. (a).) This section "codifies a rule that this court adopted more than 30 years ago [citation], in which

we said that polygraph test results 'do not scientifically prove the truth or falsity of the answers given during such tests.' " (*People v. Espinoza* (1992) 3 Cal.4th 806, 817.)

"States have substantial latitude under the Constitution to define rules for the exclusion of evidence and to apply those rules to criminal defendants." (*Clark v. Arizona* (2006) 548 U.S. 735, 789.) The statutory ban against admission of polygraph evidence " ' "is a 'rational and proportional means of advancing the legitimate interest in barring unreliable evidence.' " ' " (*People v. McKinnon* (2011) 52 Cal.4th 610, 663, quoting *People v. Hinton* (2006) 37 Cal.4th 839, 890.)

The California Supreme Court has repeatedly held section 351.1 does not violate a criminal defendant's constitutional rights. In *People v. McKinnon, supra,* 52 Cal.4th 610, the court held the "state's exclusion of polygraph evidence is adorned with no exceptions, and its stricture on admission of such evidence has been uniformly enforced by this court and the Court of Appeal." (*Id*. at p. 663.) The court noted "a per se rule excluding all polygraph evidence 'offends no constitutional principle.' " (*Ibid*., quoting *United States v. Scheffer* (1998) 523 U.S. 303, 314-315 (*Scheffer*).)

Similarly, in *People v. Richardson* (2008) 43 Cal.4th 959, the defendant asserted Evidence Code section 351.1 violated his rights to due process and to present a defense. The court held "the categorical exclusion of the results of such examinations did not violate the federal Constitution." (*Richardson*, at p. 1032, citing *People v. Wilkinson* (2004) 33 Cal.4th 821, 849.) Likewise in *People v. Wilkinson* (2004) 33 Cal.4th 821, the court rejected the defendant's claim section 351.1 deprived her of her constitutional right to present a defense, noting "defendant 'was barred merely from introducing expert opinion testimony to bolster [her] own credibility.' " (*People v. Wilkinson*, at p. 852, citing *Scheffer, supra*, 523 U.S. at p. 317.)

The United States Supreme Court has reached the same conclusion. In *Scheffer, supra,* 523 U.S. 303, the court considered whether Military Rule of Evidence 707, "which makes polygraph evidence inadmissible in court-martial proceedings, unconstitutionally abridges the right of accused members of the military to present a defense." (*Scheffer*, at p. 305.) The court noted a "fundamental premise of our criminal trial system is that 'the

jury is the lie detector.' [Citation.] Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] . . . belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge . . . .' (*Id.* at p. 313, citing *Aetna Life Ins. Co. v. Ward* (1891) 140 U.S. 76, 88.) The per se rule excluding polygraph evidence is a "rational and proportional means of advancing the legitimate interest in barring unreliable evidence," and thus "offends no constitutional principle." (*Scheffer*, at pp. 312, 315.)

We decline Wherry's invitation to revisit the holdings of the California and United States Supreme Court on the constitutionality of a per se exclusion of polygraph evidence. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Wherry's claim that application of Evidence Code section 351.1 violated his constitutional rights is without merit.

B. Prosecutorial Misconduct

Wherry asserts the prosecutor committed misconduct in his opening statement by violating an in limine ruling, and both defendants claim prosecutorial misconduct in the closing argument was prejudicial.[3] They contend the prosecutor appealed to the jury's sympathy and passion, disparaged defense counsel and argued facts not in evidence. Defendants contend the cumulative effect of this alleged misconduct deprived them of their due process rights.

The standards governing review of misconduct claims are settled. "A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such ' "unfairness as to make the resulting conviction a denial of due process." ' [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial. [Citation.] In order

[3] Though Campbell joins in Wherry's arguments regarding prosecutorial misconduct without limitation, he does not specifically raise the issue regarding mention of Stallings, given his defense that Stallings forced him to commit the crime. To the extent Campbell has raised the issue, it fails because, inter alia, he invited any error, raised no objection, and suffered no prejudice.

to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review." (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1328.)

"Under the federal standard, prosecutorial misconduct that infects the trial with such ' "unfairness as to make the resulting conviction a denial of due process" ' is reversible error. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 . . . .) In contrast, under our state law, prosecutorial misconduct is reversible error where the prosecutor uses 'deceptive or reprehensible methods to persuade either the court or the jury' (*People v. Price* (1991) 1 Cal.4th 324, 447 . . .)[4] and ' "it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct" ' (*People v. Wallace* (2008) 44 Cal.4th 1032, 1071 . . .). To preserve a misconduct claim for review on appeal, a defendant must make a timely objection and, unless an admonition would not have cured the harm, ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct." (*People v. Martinez* (2010) 47 Cal.4th 911, 955-956.)

Wherry claims the prosecutor violated the court's in limine order in his opening statement by referring to William Stallings a number of times. " '[R]emarks made in an opening statement cannot be charged as misconduct unless the evidence referred to by the prosecutor "was 'so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted.' " ' [Citation.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 762.)

The in limine order regarding Stallings' deal with police was sought by the prosecutor. At the preliminary examination, Sergeant Jones testified he agreed to release Stallings if he showed police where the stolen money was, and Stallings assisted police in recovering the bulk of the stolen cash. Despite the refusal of the district attorney to make a deal with him, Sergeant Jones ordered Stallings released from jail, citing " 'insufficient

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[4] Superseded by statute on other grounds as state in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165.

evidence.' " At the time, Stallings was a deserter from the Marines, and his whereabouts were unknown at the time of the preliminary hearing.

In seeking the in limine order, the prosecutor stated: "It is my position there should be no inquiry of Sergeant Jones as it relates to this entire Stallings arrest, taking a statement, release whatever. That entire area is not relevant and hearsay. I know [defense counsel] wants to stand up in front of the jury and inquire of Sergeant Jones whether or not he took a statement from Mr. Stallings and whether or not he released him and suggest to the jury that he somehow was given preferential treatment. [¶] My point is this: Those questions are not relevant. There's already been a motion in limine by the prosecution to exclude the mentioning of Mr. Stallings's charged status, given that fact he's not going to be testifying at trial. . . . [¶] The defense counsel should be directed to stay out of that entire area beyond the fact that he was arrested. Whether or not he gave a statement or whether or not Tony Jones tried to work out immunity or not is completely irrelevant and opens the door if they're going to inquire into that area to the actual content of the statement."

The court ruled: "I just see that creating all sorts of confusion and opening the door for all sorts of jury misconduct, and why isn't Mr. Stallings here and that's not fair, and while it's probably not fair, that's not something for the jury to consider. [¶] . . . [¶] I'm going to admonish both parties not to mention Stallings. Anything that needs to be redacted from Mr. Stallings's name will be redacted. . . . [¶] So at that point, I just think Stallings is subject to ruling that it's more time consuming, confusing to bring Mr. Stallings up in this trial. Both parties will be ordered to stay away from that guy." Campbell's attorney raised the issue of her client choosing to testify, and the court responded: "If your client testifies, we have a whole different set of rules if one of the defendant[s] decides to testify."

A week later, the prosecutor gave his opening statement and mentioned William Stallings a number of times, all without objection. Specifically, he stated: "Clifton Wherry planned this crime with an individual by the name of William Stallings and the defendant who is sitting next to him, Dwight Campbell. . . . [¶] . . . [¶] Mr. Stallings's

role in this robbery was going to be served as a getaway driver. Mr. Stallings planned this robbery as well and he was actually going to make off with the money and split it up at [a] later date."

Campbell's attorney then gave an opening statement in which she acknowledged Campbell had confessed. She also indicated Campbell would testify Stallings gave him a loaded gun and forced him to get in the back of the armored truck and take the money, and that shooting Quintero was an accident. Wherry's attorney did not object.

After the testimony of the first witness, Wherry's attorney moved for a mistrial or severance based on the mention of Stallings in both the prosecution's and Campbell's opening statements. Wherry's attorney acknowledged "we all received notice prior to the openings that [Campbell's counsel], on behalf of her client, was going to involve Will Stallings. [¶] So what I infer is that the prosecution, knowing that, in his opening, talked about Will Stallings to a degree. . . . [¶] . . . [¶] So if in the portion of the statement Will Stallings comes in against my client, because the door has been opened by co-counsel, that . . . completely damages our case [and] . . . upsets the strategy that I had planned for the case. . . . [¶] . . . [¶] Now, I can't castigate co-counsel. She has her duties. But based on *her* potentially opening the door to evidence about Stallings, and then I see [a] prospect that maybe a statement will come in, maybe he will testify, I'm moving for [mistrial or severance]." (Italics added.)

The court responded: "[B]ased upon the representation that I got from [Campbell's counsel] this morning was only in reference to what her client was going to testify to in person on the stand, not what Mr. Stallings told somebody in a taped statement. . . . [¶] So that's why I didn't consider any reservation or renewal of my order because my order primarily went to the statement itself because I didn't want to open the door by having him mention to the point that somebody could bring the statement in. I can't prevent somebody from getting on the stand and talking about their co-conspirator." The court denied Wherry's motions for mistrial or severance as "premature," given that Stallings was not testifying.

Even had Wherry not waived this issue by failing to object at the time the statements were made, the record reflects no misconduct on the part of the prosecutor. Wherry's attorney acknowledged the prosecutor learned Campbell was planning to testify before making his opening statement. Campbell's attorney stated on the record "before I gave my opening statement, I had called [Wherry's counsel] the night before. . . . And prior to giving my opening statement, actually [the prosecutor giving] his opening statement, we all met in chambers and I told you exactly what I was going to do. I told [the prosecutor and defense counsel.]" As the court had previously ruled, "we have a whole different set of rules if one of the defendant[s] decides to testify."

When Wherry's counsel finally objected to the mention of Stallings, it was in regard to Campbell's attorney "opening the door," not to any claimed prosecutorial misconduct. The next day Campbell's counsel sought admission of Stallings's statement to police, and the prosecution sought admission of Wherry's statements to police regarding Stallings. Wherry's counsel objected, claiming he had detrimentally relied on the court's ruling regarding any mention of Stallings by not making an opening statement. The court did not allow introduction of Stallings's statement to police, but allowed evidence of Wherry's statements to police about Stallings.

Even had Wherry's counsel not waived this claim by failure to make a timely objection, we perceive no prejudice to Wherry. Other than learning Stallings facilitated return of the stolen money, the jury learned nothing about Stallings's statement to police implicating Wherry. Wherry's only claim of prejudice was that his counsel would have made an opening statement had he known Stallings would be mentioned. This claim is belied by the record, which indicates Wherry's counsel was informed the night before opening statements of the strategy of Campbell's defense counsel regarding Stallings.

Defendants also claim the prosecutor committed misconduct a number of times in his closing argument. The prosecutor first stated: "Now, we've heard a lot of talk about Clifton Wherry and Anthony Quintero, and in this type of case, it's very easy to forget about the victim. You see the defendants here every day and you don't have an opportunity to see the victim because he's no longer here. [¶] Clifton Wherry has a child

and he has a family. His daughter will have an opportunity to grow up knowing her father. [¶] Dwight Campbell has a family and a daughter. His daughter will have an opportunity to grow up knowing her father. [¶] But, ladies and gentlemen, let us not forget Anthony Quintero has a family. . . ."

At this point, Wherry's counsel objected that "It's argumentative beyond the limit. He's asking the jury to engage in passion and sympathy for family." The court overruled the objection, and the prosecutor continued. "Anthony Quintero has a family. Anthony Quintero has a five-year-old daughter. And his daughter will never have an opportunity to grow up getting to know her father ever because of what these men did. [¶] This is the result of Dwight Campbell and Clifton Wherry's criminal conduct. All in pursuit of money. Take a look at it. Don't forget about the victim."

An " 'appeal for sympathy for the victim is out of place during an objective determination of guilt. [Citations.]' [Citations.]" (*People v. Jackson* (2009) 45 Cal.4th 662, 691.) Fair comment on the evidence, however, is not misconduct. (*People v. Osband* (1996) 13 Cal.4th 622, 696.) If the appeal to sympathy is brief and evidence of a defendant's guilt is overwhelming, there is no prejudice. (See *People v. Mendoza* (2007) 42 Cal.4th 686, 704 [finding no prejudice where prosecutor stated " 'Can you imagine the terror that this child [victim] is going through[?]' "].) The comments here were brief and in response to the character evidence defendants introduced at trial, including the fact that both Wherry and Campbell were fathers.

Wherry and Campbell also assert the prosecutor twice argued facts not in evidence, and that this constituted improper "vouching." The prosecutor argued: "What is reality is every day guilty defendants manufacture evidence, fabricate defenses in order to defeat the criminal justice system. Every day defendants are working hard to try to stay one step ahead of the cops. When an officer sits down and takes a statement in a homicide case, it's not a scenario where the defendants are suspects in those cases, sit down, swear to tell the whole truth and sit down and lay it out exactly as it happened. In most instances, in reality, they lie for the most part."

"When a defendant's testimony contradicts the strong evidence of his guilt, it is not improper to call him a liar." (*People v. Zambrano* (2008) 41 Cal.4th 1082, 1173, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Both defendants' testimony not only contradicted the strong evidence of their guilt, but their prior statements. Campbell contradicted his own testimony on direct examination that he had never met with Wherry when he conceded on cross-examination he had met Wherry a few weeks before the robbery. Given the evidence adduced at trial, the prosecutor's comments, though about defendants in general, were not misconduct.

Defendants also assert the prosecutor improperly vouched for Sergeant Jones. The prosecutor argued "as you will recall, consistently, Mr. Wherry and Mr. Campbell, as I asked them questions about their prior statements, they would ask me, hey, was that the off-tape version or was that the on-tape version? Where do you think that came from, ladies and gentlemen, in terms of this whole discussion and planning about off tape and on tape? The manner in which these statements are taken was no different than how Sergeant Jones, Oakland Police Department and all the police departments in California take statements." The court overruled the objections by Wherry's counsel.

" 'A prosecutor may make "assurances regarding the apparent honesty or reliability of" a witness "based on the 'facts of [the] record and the inferences reasonably drawn therefrom.' " [Citation.] But a 'prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record." [Citation.]' [Citation.]" (*People v. Redd* (2010) 48 Cal.4th 691, 740.) The only part of the quoted argument that referenced facts outside the record was the comment about how "all the police departments in California take statements." Sergeant Jones testified as to how he and the Oakland Police Department took off-the-record and recorded statements. While the prosecutor's comment about "all" police departments had no evidentiary support in the record, taken alone it was a hyperbolic, fleeting reference.

Lastly, appellants point to the prosecutor's statement that Wherry's counsel "was making it up and that's what defense attorneys do. They make up defenses and that's

what happened in this case." The court correctly sustained both defense counsels' objections. It is misconduct for a prosecutor "to cast aspersions on defense counsel or suggest that counsel has fabricated a defense." (*People v. Mendoza, supra*, 42 Cal.4th at p. 701.) Defense counsel did not seek an admonishment, but the court later instructed the jury that "Statements made by the attorneys during the trial are not evidence."

To the extent defendants preserved and demonstrated their various claims of prosecutorial misconduct, we view the claims through the lens of the standard of review. Our review of the record indicates the evidence in this case was overwhelming. Both defendants confessed to police in taped statements. Wherry's defense was that his entire confession was false, made only to secure a two-year prison deal he testified Sergeant Jones had offered him. In his confession, however, he told police he had hidden a cell phone in the bushes near the Brinks' facility, which police subsequently found. At trial, he testified he never told police about a phone in the bushes. Campbell's defense was that Stallings forced him to participate in the robbery by threatening his mother, and that he killed Quintero when the gun went off accidentally. The court refused an instruction on duress, finding there was insufficient evidence to support it, a ruling Campbell does not challenge on appeal. Campbell's testimony at trial was so inconsistent, both internally and with portions of his taped confession, as to be almost entirely unbelievable.

Given the incredible and inconsistent testimony of both Wherry and Campbell in this case and the overwhelming evidence against them, it is not " 'reasonably probable that a result more favorable to the defendant would have been reached without the misconduct,' " to the extent any occurred. (*People v. Wallace, supra*, 44 Cal.4th at p. 1071.)

IV. DISPOSITION

The judgments are affirmed.

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Banke, J.

We concur:

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Marchiano, P. J.

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Margulies, J.